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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 308

IN THE MATTER OF V-I-D, INC.,

Debtor.

KELLEY, GLOVER & VALE, INC., Trustee,

Appellant-Petitioner,

vs.

Mc M. COFFING, Trustee,
GEORGE MICHAELY, Successor Indenture-Trustee,
CHARLES J. KRAMER and
HELEN E. KRAMER, Indenture Bondholders,

Appellees-Respondents.

Petition for Writ of Certiorari

to the United States Court of Appeals for the Seventh Circuit.

JAY E. DARLINGTON,
306 Hammond Building
Hammond, Indiana
Attorney for Appellant-Petitioner.

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Appellees-Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit.

May it Please the Court:

Opinions Below.

The Court of Appeals' opinion is reported in:

In re V-I-D, Inc. (7 Cir.) 243 F. 2d 566.

It is also printed in the Appendix hereof at page 36.

There was no opinion by the District Court (N.D. Ind.). Its order, appealed from, is printed in the Appendix hereof, at pages 13-15.

Grounds on Which This Court's Jurisdiction is Invoked

Jurisdiction is invoked under 28 U.S.C. 1254 and 2101.

Both the appeal below and this Petition are timely. The Court of Appeals' judgment dismissing Petitioner's appeal (for alleged lack of "appealable interest" but not for untimeliness or technical defect) was dated and entered on April 22, 1957. This Petition is filed on July 23, 1957, pursuant to an extension of time granted by this Court upon timely application.

Questions Presented for Review:

Petitioner (appealing from the District Court to the Court of Appeals) admittedly is the Class 2 Creditor in this corporate reorganization proceeding under Chapter X in the District Court. That Court's order, appealed from, made final fee allowances to the Trustee, Trustee's counsel, and debtor's counsel, totaling $41,500, which is about 45% of the "reorganized" debtor's assets of about $94,000. (Petitioner-appellant sought no fees for itself or counsel).

Petitioner appealed, attacking the fee allowance order not merely as excessive, but primarily as being *illegal* and *collusive* between the attorneys receiving the fees, contrary to 18 U.S.C.A. 155 and other statutes cited infra.

The Court of Appeals, on motion of the appellees whose attorneys received the fees, dismissed the appeal in a *per curiam* memorandum opinion, holding:

> "In previous appeals, Nos. 11194 and 11265, 226 F.2d 113, the present appellant was before this court. In *those* cases appellant appealed from *orders* entered *approving* a Chapter X (11 U.S.C.A. § 501 et seq.) Reorganization *Plan*. In our decision, we recognized that the net result of this prolonged litigation was the determination that appellant, a mortgage holder,

was relegated to the status of a *Class 2 creditor*, and that the bond holders were Class 1 creditors. As the assets were insufficient to cover the claims of the Class 1 creditors, appellant's claim was of no value. *Consequently*, we concluded that the appellant *did not have an appealable interest* and allowed a motion to dismiss the appeal.

"The *present* appeal seems to be directed to the basic legality of the reorganization proceedings *as well* as to *fee allowances*. However, as pointed out by the appellee, *necessarily*, as a *prerequisite* to this appeal, *appellant must* be an *aggrieved* party. Therefore, appellant stands in precisely the *same* position it occupied in the previous appeals, and the motion to dismiss must be and is granted." (Our italics). 243 F.2d 566; Appendix, page 36, infra.

Petitioner seeks only to require the Court of Appeals to *entertain* the appeal,—not to review its merits here. Accordingly, the basic question presented to this Court is:

Should a Court of Appeals ratify alleged maladministration in the District Court, by refusing to review an order allowing allegedly illegal and collusive fees in a corporate reorganization proceeding, on the ground that the appellant, who seeks to bring the illegal order before the Court of Appeals, lacks a pecuniary interest in the outcome of the appeal, when the appellant admittedly is a party to the proceeding, and the motion to dismiss the appeal is made by the appellees' attorneys who were allowed the fees.

The serious nature of appellant's charges of illegality and collusion in the fee allowance order, is not disclosed in the above *per curiam* opinion. The opinion gives the erroneous impression that this was a routine attack on lawful fees, made by a party having no concern therewith.

The most serious error presented to the Court of Appeals concerns the alleged unlawful and collusive administration of a Chapter X corporate reorganization in the District Court.

This transcends the question of protecting the appellant's own rights.

Petitioner-appellant does, however, have an "appealable interest," as shown in the Argument at pages 9-10, infra, though a showing thereof is not or should not be necessary to get a Court of Appeals to consider the merits of such charges.

On the basis of this Court of Appeals' ruling, a debtor's estate can be divided up as fees between the trustee's attorneys and debtor's attorney and other fee claimants, in defiance of 18 U.S.C. 155 (infra), and the matter never can come before a Court of Appeals.

None of the recipients of the fee allowances will appeal in such case, because the object and effect of the collusion is to satisfy each of them so none will appeal. This was quite frankly admitted by some of these fee recipients in the District Court. (Appendix, pages 31-33, infra).

Then, it only remains for the fee recipients to make common cause in moving to dismiss the appeal of any other party, by attacking the appellant's "appealable interest", or by attacking the character and good faith of the appellant, both of which were done by these appellees. (Appendix, pages 21-27, infra).

This is what the Court of Appeals' memorandum opinion ratifies.

Statutes Involved.

The statute principally involved in this Petition is:

"Whoever, being a party in interest, whether as a *debtor*, *creditor*, receiver, *trustee* or representative of any of them,

or attorney for *any* such party in interest, in any receivership, bankruptcy *or reorganization proceeding* in any United States court or under its supervision, enters into *any agreement*, express *or implied*, with *another* such party in interest *or attorney* for another such party in interest, for the *purpose of fixing the fees* or other compensation to be paid to any party in interest or *to any attorney* for any party in interest for services rendered in connection therewith, from the assets of the estate; or

"Whoever, being a judge of a court of the United States knowingly approves the payment of any fees or compensation so fixed—

"Shall be fined not more than $5,000 or imprisoned not more than one year, or both. As amended May 24, 1949, c. 139, § 4, 63 Stat. 90." (Our italics)

18 U.S.C. 155

Statement of Facts.

The Record.

The record taken from the District Court to the Court of Appeals in this appeal was extensive, for purpose of review on the merits. This is indicated by the record citations in the Motions to Dismiss the appeal, and in Petitioner-appellant's Opposition thereto. (Appendix, pages 21-35).

But, since this Petition seeks only to require the Court of Appeals to *entertain* the appeal on the merits,—not to review the merits here,—Petitioner has filed only a small Transcript here, sufficient to show the *existence* of a question before the Court of Appeals which that Court should entertain on the merits.

The record filed with this Petition is presently in manuscript form, but since it is small, **it is printed in its entirety (except formal parts) as an Appendix to this Petition.**

Other Facts.

The facts already set forth under the heading "Questions Presented for Review" suffice for consideration of the narrow question presented by this Petition, we believe.

Any needed amplification will appear concisely in the Argument and Appendix.

Jurisdiction of the District Court.

This is sufficiently shown by the admitted fact that the debtor is in a Chapter X corporate reorganization proceeding, as recited in the Court of Appeals' *per curiam* opinion, *supra.*

The propriety of the District Court's long continuance of that jurisdiction, and of its administrative orders thereunder, is a matter going to the merits, not here involved.

ARGUMENT.

The only reason for dismissal of the appeal, given in the Court of Appeals' *per curiam* opinion was appellant's alleged lack of "appealable interest." (page 2, *supra;* also Appendix, page 36, *infra.*)

As Petitioner understands, this Court will not go into questions not decided by the Court of Appeals, in an effort to find another ground to sustain its apparently erroneous opinion and decision.

This is particularly true where the only question brought to this Court is the Court of Appeals' erroneous refusal to decide the other questions.

Timeliness of the appeal was not denied in the Motions to Dismiss or in the *per curiam* opinion. (Appendix, pages 21, 36, *infra*). It is shown by the record here, that Notice of Appeal was timely filed in the District Court within 30 days after the fee allowance order, and the appeal was.

docketed and transcript filed in the Court of Appeals within 90 days after the Notice of Appeal. (Appendix, pages 15, 20 *infra*).

Likewise, appellant's Opposition to dismissal pointed out that this appeal is governed by the practice in civil appeals, and refuted a frivolous contention in the first Motion to Dismiss that "leave to appeal" was required. (Appendix, pages 29-30, *infra*).

As above shown, the only question here is the *existence* —not the merits—of a question or questions presented by Petitioner-appellant to the Court of Appeals, which that Court ought to *entertain*. Certionari will be granted in a proper case to require a Court of Appeals to entertain an appeal on the merits:

> *Atherton* v. *Atherton* (1937) 302 U.S. 643, 68 S. Ct. 53
>
> *Lutcher & Moore Lumber Co.* v. *Knight* (1910) 217 U.S. 257, 30 S. Ct., 505, 509-510

And in determining whether such a question was presented to the Court of Appeals, we believe it is proper and necessary for this Court to take at face value the factual statements, some of which are summarized and some quoted verbatim from the record in the Court of Appeals, as set forth in Petitioner-appellant's Opposition to the motions to dismiss. (Appendix, pages 28-35, infra). Though entitled "appellant's brief opposing motions to dismiss," it is in substance appellant's short factual summary of the Court of Appeals' record, plus legal contentions why the appeal should be entertained, including specifically **18 U.S.C. 155**, above quoted. (Appendix, page 33). Moreover, the appellees' Motions to Dismiss indulged in extended recitals of alleged facts, not only from the record in the present appeal, but also from the opinions in earlier appeals in this proceeding. (Appendix, pages 21-27, *infra*).

I

Alleged Violations of 18 U.S.C. 155 in the District Court's Order, Deserve Consideration by the Court of Appeals, Regardless of Petitioner-appellant's Technical "Appealable Interest."

Several verbatim statements of the fee-claiming attorneys in the fee hearing in the District Court, as set forth in Petitioner-appellant's Opposition to the motions to dismiss, seem to show plainly that the attorneys who were allowed the major part of the fees in that order, proceeded in direct disregard or violation of the provisions of 18 U.S.C. 155, quoted supra.

To avoid repetition, see these statements quoted in Appendix, pages 31-33, infra.

The identity of the attorneys speaking or named in those quotations is shown in the fee allowance order, and also in their Motions to Dismiss the Appeal, to be as follows:

"Mr. Draper" is Mr. Floyd S. Draper, a former attorney for the trustee. (Appendix, page 14, *infra*).

"Mr. Call" is Mr. Kenneth Call, now and in the past, attorney for the debtor. (Appendix, page 14).

"Mr. Lyddick" is Mr. John W. Lyddick, now and in the past, attorney for intervenors Kramer and wife and also for the successor indenture trustee (Class 1 bondholders). (Appendix, page 22).

"Mr. Slatter" is one of the firm of attorneys formerly representing the indenture trustee and successor indenture trustee (Class 1 bondholders). (Appendix, page 14, par. 5).

It has long been a basic principle that a reviewing court will not, by technicalities or by closing its eyes, ratify or rubber-stamp an order from below which is or is alleged

to be based upon *illegality* or *collusion* of the parties obtaining the order. See, for instance, the statement in the following case with reference to approval of a plan, which is equally or more applicable here:

> "The court will be diligent to protect *itself* and the *public* from approval of unfair plans, even by *default*, and may take for its own use evidence no party would have a right to force upon it." (Our emphasis).
>
> *Comstock v. Group of Institutional Investors* (1948) 335 U.S. 211, 227, 68 S. Ct. 1454, 1462.

Further, the situation presented in this Petition, seems sufficient to invoke the following reason for certiorari indicated by this Court:

> "Where a court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, *as to call for an exercise of this court's power of supervision.*" (Our emphasis).
>
> Rule 19(1)(b) of the Supreme Court.

II

Though Not Required in This Case, Petitioner-appellant Does Have a Statutory "Appealable Interest" or Right to Appeal.

Petitioner-appellant's admitted *status* as a "creditor" gives it a statutory right to appeal:

11 U.S.C. 606 (quoted in Appendix, page 29).

The above section—

> "grants *any* stockholder or *creditor* the *right to be heard* on *all* matters relating to corporate reorganizations. Courts have liberally construed this language as *authorizing appeals.*" (Our italics)
>
> *Young v. Higbee Co.* (1945) 324 U. S. 204, 209-210, 65 S. Ct. 595, 594, 89 L. Ed. 890

In the above section 206 of the 1938 Chandler Act (11 U.S.C. 606) the intent of Congress was that "*Former* restrictions on such right to be heard are *eliminated* as being *undesirable*". (Hence, earlier cases are obsolete).

In re: *Keystone Realty Holding Co.* (3 Cir. 1941) 117 F. 2d 1003, 1005

Also, such right of appeal is not cut off by the fact that Petitioner-appellant did not attend the fee hearing in the District Court, particularly in view of: (1) the persistent contention of the appellees that Petitioner had "no right to be heard", (2) the mandatory duty imposed upon the fee applicants and on the District Judge, not to seek or allow collusive fees of this kind; and (3) Petitioner's right to assume that the law would be followed at the fee hearing.

Dudley v. *Mealey* (2 Cir. 1945) 147 F. 2d 268, 270, 272

Horowitz v. *Kaplan* (1 Cir. 1951) 193 F. 2d 64, 66

See discussion in Appendix, pages 34-35.

In addition, the subject matter of *fee allowances* is specifically made appealable "*independently* of other appeals", and upon the original papers:

11 U.S.C. 65[illegible] (quoted in Appendix, page 29).

Dismissal of Former Appeal Is No Bar to Entertaining This One

The Court of Appeals' opinion (pages 2, 36) erroneously uses its dismissal of Petitioner-appellant's former appeal from approval of the Plan as a *precedent* justifying the present dismissal (though apparently *not* treating the

former dismissal as res adjudicata *precluding* the Court from entertaining this appeal).

The subject matter of this appeal is distinct in time and *nature*. It involves questions of alleged maladministration of justice in the District Court, under 18 U.S.C. 155 and other statutes, not involved in the former appeal on the Plan.

Moreover, no final decree having been entered closing the estate,—*the entire process* of reorganization is open to *re-examination* until the *closing* of the proceedings.

Pfister v. Northern Illinois Finance Corporation, 317 U.S. 144, 152, 63 S. Ct. 133, 138, 87 L. Ed. 146.

See discussion of this point in Appendix 33-34.

Hence, ample power remains in the Court of Appeals and District Court to re-examine "the *basic legality* of the reorganization proceeding *as well* as to fee allowances", which the Court of Appeals' opinion says this appeal seeks to do (pages 3, 36), and Petitioner urges that any remand by this Court should leave the door open for the lower Courts to exercise that power.

Conclusion

Wherefore, Petitioner prays that this Court may issue its writ of certiorari to require said Court of Appeals to entertain and review Petitioner's appeal, and for all other just and proper relief.

JAY E. DARLINGTON,
Attorney for Petitioner

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2850 In Bankruptcy

IN THE MATTER OF V-I-D, INC.

ORDER

At Hammond, in said District, on the 29 day of October, 1956.

This cause having come on to be heard on the 10th, 11th, and 21st days of September, 1956, pursuant to the order of this court of March 26, 1956, fixing May 11, 1956, as the time for the hearing of applications for allowances herein, and pursuant to the continuances of said hearing from the said 11th day of May, 1956, to the 10th day of September, 1956, notice of said hearing having been given as prescribed by this court in said order,

NOW upon the applications for the allowances of compensation and for reimbursement for costs and expenses filed herein, and all the proceedings had before me at the said hearing, and due deliberation having been had thereon, it is

FOUND, ORDERED, ADJUDGED AND DECREED:

1. That the petition of McM. Coffing for an allowance for services rendered and to be rendered by him as Trustee herein be and the same is hereby allowed in the total amount of $13,000; that credit be given against said allowance for all amounts heretofore or hereafter deducted by said Trustee from the rentals collected by him as set forth in his current reports as well as in his petition and denominated therein, "5% rental collection fee"; that in addition

thereto credit be given against said allowance for the sum of $1,000, heretofore allowed said petitioner as an interim allowance.

2. That the petition of Kenneth Call for an allowance for services rendered by him as attorney for the debtor in this proceeding be and the same is hereby allowed in the sum of $3,000, together with the sum of $6.82 for expenses incurred by him in this proceeding as set forth in his petition; that credit be given against said allowance for the sum of $2,000, heretofore allowed said petitioner as an interim allowance by the order of May 13, 1950.

3. That the petition of Floyd S. Draper and Leontine P. Draper, as Executrix of the Estate of Alfred P. Draper, deceased, for allowances as attorney fees for services rendered by Floyd S. Draper and Alfred P. Draper as attorneys for the Trustee from June 30, 1939, to January 1, 1943, and from January 8, 1955, to July 18, 1955, be and the same is hereby allowed in the sum of $2,000, and by Alfred P. Draper as attorney for the Trustee from January 1, 1943, to January 8, 1955, be and the same is hereby allowed in the sum of $17,000, together with an allowance of $241.53, for expenses as set forth in said petition; said allowance for services shall be in addition to the $4,000 interim allowance made to Draper & Draper pursuant to the order of May 13, 1950.

4. That the petitions of Albert H. Gavit for allowances for services rendered and to be rendered by him as attorney for the trustee herein be and the same is hereby allowed in the sum of $2,500, together with an allowance of $3.96 for expenses as set forth in said petition.

5. That the petition of Goldberg, Devoe, Brussell and Shadur for an allowance for services rendered as attorney for Lawrence H. Pryblski, as indenture trustee and Peter

L. Evans, successor trustee, be and the same is hereby disallowed in its entirety.

Enter:

LUTHER M. SWYGERT
Judge

(Caption omitted—filed November 28, 1956)

NOTICE OF APPEAL

The Class 2 creditor herein, Kelley, Glover and Vale, Inc., Trustee, hereby gives notice that it appeals to the United States Court of Appeals for the Seventh Circuit from that certain order dated and filed in this proceeding on October 29, 1956, and from each separate allowance therein set forth, and from numbered Paragraphs 1, 2, 3 and 4 separately of said order.

JAY E. DARLINGTON
Attorney for said Class 2. Creditor, Kelley, Glover and Vale, Inc., Trustee

(Clerk's Certificate of mailing above notice, omitted)

Appendix—Statement of Points on Appeal

(Caption omitted—filed in District Court Dec. 26, 1956)

STATEMENT OF POINTS ON APPEAL

On its appeal from the order of October 29, 1956 in this proceeding, the Class 2 creditor, Kelley, Glover and Vale, Inc., Trustee, will rely upon the following points:

1. This order is reviewable at the instance of this appellant, because:

(a) No final decree having been entered in the District Court closing this reorganization proceeding,—the entire proceeding is still under the jurisdiction of the District Court for all appropriate judicial action required by the Act and by equitable principles, including the basic question of whether this corporate reorganization proceeding should proceed to consummation through the approved "plan," or be dismissed as being outside the proper scope of the Act.

(b). By the terms of the Act, and for reasons of public policy, this appellant is entitled to appeal from said order relating to allowances to attorneys and the trustee for fees and disbursements. This right is not cut off by the District Court's previous orders of February 1, 1954 and June 30, 1954, overruling this appellant's attacks upon the amended plan, nor by the Court of Appeals' dismissal of the appeal therefrom on the ground of "no appealable interest" in the Plan. The Act gives this Class 2 creditor the right to appeal from this fee order, not merely for its own pecuniary benefit, but in the public interest.

2. The allowances set forth in said order of October 29, 1956, (from which this appeal is taken) are each erroneous and unlawful in each of the following respects:

(a) No allowance of such fees and disbursements can properly be made because, (conceding the District Court's initial jurisdiction over the subject matter of this corporate reorganization proceeding), subsequent developments in this proceeding, including those disclosed in the petitions for said allowances, show that this proceeding turned out to be one outside the proper scope and purpose of the Act, namely, a corporate reorganization proceeding continued (if not originally commenced) with the sole purpose and effect of using Chapter X as a means to enable the Class 1 creditors to gain an inequitable and unlawful lien advantage over the lien of this Class 2 creditor, thereby evading the Indiana law which would have produced an opposite result between these two Classes in the state court foreclosure which was suspended by this proceeding. Thereupon, it became and remained the duty of the District Court to dismiss the proceeding upon learning of said situation from whatever source. And apart from said duty of dismissal, it became the Court's duty to refrain from making said allowances, which constitute a continuation of said error and said violation of the Act.

(b) It appears in the record designated for this appeal, and particularly in said petitions for said allowances, that the aforesaid continuation of this proceeding after it turned out to be outside the proper scope and purpose of the Act, as above described in (a), was due largely or entirely to the erroneous urging of that course upon the District Court by said petitioners. And it further appears from said designated record and said petitions, that the greater part of the services for which said petitioners sought and

obtained fees by said Order consist of services rendered by them in thus improperly carrying forward said reorganization proceeding after its aforesaid impropriety became apparent, and after said impropriety was pointed out by this appellant.

(c) Apart from their basic impropriety, above set forth in (a) and (b), said allowances in said order of October 29, 1956, added to the interim allowances to the same officers and attorneys in the order of May 13, 1950, aggregate between 40% and 50% *of the entire assets* of the debtor as of October 29, 1956. This is excessive, as to each of said allowances, and also in the aggregate, to such an extent as to violate the basic purposes of the Act. This, in turn, demonstrates the impropriety, and the consequences, of the use made of this proceeding by the debtor, the trustee and the Class 1 creditors, above described under (a) and (b).

(d) Each of said allowances, and particularly those allowances made to former counsel for the trustee, successor counsel for the trustee, and to the trustee himself, have been made to persons disqualified to receive same under the terms and purpose of the Act, and who failed to make the mandatory statutory showing of *disinterestedness* by affidavit and proof.

JAY E. DARLINGTON
Attorney for said Class 2 Creditor-Appellant.

(Affidavit of service of above Statement of Points, omitted)

Appendix—Certificate of Clerk of District Court.

UNITED STATES OF AMERICA,
Northern District of Indiana, ss:

I, KENNETH LACKEY, Clerk of the United States District Court for the Northern District of Indiana, do hereby certify that the annexed and foregoing is a true and full copy of the original of the order filed on October 29, 1956; the Notice of Appeal from said order filed on November 28, 1956; and the Statement of Points of said Appeal filed December 26, 1956; in my office No. 2850 in Bankruptcy.

I further certify that pursuant to rule 12(a) of the United States Court of Appeals for the 7th Circuit, that I transmitted to the Clerk of said Court as part of the transcript and record of said Appeal, the original file of said 2850 Bankruptcy in my office, including therein the above described documents, and that said original file, including the above described documents was docketed in the office of Clerk of said U. S. Court of Appeals for the 7th Circuit as the transcript and record of said Appeal, No. 11983 in the matter of V-I-D, Inc. Kelley, Glover and Vale, Inc., Trustee, Appellant vs. McM. Coffing, Trustee, et al, Appellees; and that thereafter when the mandate of said Court of Appeals came down to my office with the judgment dismissing said Appeal, said Clerk of Court pursuant to its said rule 12(a) returned said file including the above described documents to my office and herewith now remain. Accordingly, at the request of said Appellant, that I have certified the said copies of said documents for its use as its part of documents and records on its petition to the Supreme Court of the United States for writ of certiorari. Said documents are now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Hammond, Indiana this 20th day of July, A.D. 1957.

Kenneth Lackey
Clerk.

(Seal) By Marilyn La Near
Deputy Clerk.

At a regular term of the United States Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the tenth day of September in the year of our Lord one thousand nine hundred and fifty-six, and of our Independence the one hundred eighty-first.

No. 11983

In the Matter of V-I-D, Inc.,
Debtor.

Kelley, Glover and Vale, Inc.,
Trustee, Appellant,

vs.

McM. Coffing, *Trustee, et al.,*
Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

And afterwards, to-wit, on the twenty-sixth day of February, 1957, there was filed in the office of the Clerk of this Court the Original Record on Appeal.

Appendix—Motion to Dismiss Appeal.

(Caption omitted—filed March 1, 1957)

MOTION TO DISMISS APPEAL

Come now McM. Coffing, Trustee, V-I-D, Inc., Debtor, and Charles J. Kramer and Helen E. Kramer, Class I Creditors herein; George P. Michaely, Successor Indenture Trustee; Floyd S. Draper and the estate of Alfred P. Draper, deceased, claimants, appellees, by Albert H. Gavit, Kenneth Call, John W. Lyddick and George P. Michaely, and Floyd S. Draper, their counsel respectively, and move the court to dismiss the attempted appeal taken herein to this court by Kelley, Glover and Vale, Inc. Trustee, upon the following grounds, and each of them, to-wit:

I.

Said attempted appeal to this court was not authorized, or permitted by law; in that appellee has no appeal as of right from the matters and things from which the appeal is attempted; and that under the Law and Statute an appeal from such matters and things can only be taken upon approval by this court on an application to so appeal, and which was not done in this case.

II.

The record, on its face, shows that the appellant is wholly without any interest in the subject matter of which the Court had jurisdiction; in that the record shows appellant had no further interest in this bankrupt estate, and that its interest was of no value in the estate, the Court having found appellant's interest was without value in the administration of the estate.

(Record—pages 32A Par. 16, 17, 22 and 29. Also record referred to of causes 11194 and 11265 of this court, pages 148 to 152.)

III.

The record before the Court shows that in the matters attempted to be appealed from, the appellant did not protest or take exception to any of the claims appealed from, did not appear in Court at any time during the hearings thereon; and did not object to any matters in the hearing, did not ask for a re-hearing or for a new trial of said matters. (Record of evidence, pages 1 and 2).

IV.

That said attempted appeal is vexatious, without foundation, without merit, spiteful, will be expensive, and is contumacious.

Dated March 1st 1957

Counsel for Appellee McM. Coffing, Trustee,
504 Broadway, Gary, Indiana

KENNETH CALL
Counsel for Appellee V-I-D, Inc., debtor corporation.
504 Broadway, Gary, Indiana

JOHN W. LYDDICK
GEORGE MICHAELY
Counsel for Appellees, Charles J. Kramer and Helen E. Kramer, Class I Creditors, and George P. Michaely, Successor Indenture Trustee.
504 Broadway, Gary, Indiana

FLOYD S. DRAPER
Counsel for Floyd S. Draper, and the estate of Alfred P. Draper, deceased.
504 Broadway, Gary, Indiana

Appendix—Motion to Dismiss Appeal.

(Caption omitted—filed March 9, 1957)

MOTION OF APPELLEE, McM. COFFING, AS TRUSTEE OF *V-I-D, INC.*, TO DISMISS APPEAL

(The record not having yet been printed, this motion is verified in lieu of record references)

Appellee, McM. Coffing, as Trustee of V-I-D, INC., moves to dismiss this appeal.

He shows to the Court:

I.

Over seventeen years ago, V-I-D, INC., went into voluntary reorganization with court approval of the good faith of the petition.

Initially, the Glover group sought to seize the real property of the debtor under a claim of fee ownership. That attack was defeated, and when in the face of the trial court's finding against her of that claim, and this Court's affirmance, she did not abide those determinations, and again came here, this Court held her conduct contumacious.

In re V-I-D, INC., 158 F (2) 964

She then came forward with the claim that she was the beneficiary under a mortgage to Keiley, Glover & Vale, as Trustee, that although it recited it was a second mortgage, that actually it was a first mortgage, since, according to her, the first mortgage was invalid. The District Court denied her contentions and this Court affirmed.

In re V-I-D, INC., 198 F (2) 392 cert. den. 344 U. S. 914

With priorities thus established, and on an unassailed finding of "no value" to the second mortgage claim, the

District Court approved an Amended Reorganization Plan for the exclusive benefit of the only "value" claimants, to-wit, the first mortgage bondholders. Again, the Glover group appealed. That appeal was here dismissed because the "no value" status of the Glover claim precluded her or it being an "aggrieved party" for appeal purposes.

In the matter of V-I-D, INC., 226 F. (2) 113, cert. den.

Thereupon, to consummate the approved Amended Reorganization Plan, and before the remaining assets were to be turned over and conveyed pursuant to that plan, it was requisite that the District Court determine what fees and expenses, and in what amounts, should be disbursed for administrative items. Petitions for the various claimants were filed. The District Court ordered notice given to all concerned, and fixed a date certain by which any and all objections must be filed, and appellant was notified of that order and of the various petitions.

It ignored the notice, it filed no objections, it never entered its appearence to any of the fee petitions, and did not appear at the contested hearings thereon.

All fee petitions were, on the hearings, reduced, and one was denied in toto.

Just within the appeal period, appellant first interested itself in these fee matters its interest taking the form of filing a notice of appeal.

II.

On that state of the record, this appellee moves to dismiss this appeal because:

a.

In the matter of V-I-D, INC., 226 F. (2) 113 is the law of this case.

It adjudges appellant has no standing in this cause because its claim is a "no value one".

Hence, appellant does not meet the statutory minimum of being an "aggrieved party" which under 11 U.S.C.A. 48 is a prerequisite to appealable status.

b.

Were the question of appellant's status to appeal not heretofore adjudged against it in this very cause, it still must fail, because by unbroken precedent, a party with no value to protect cannot be aggrieved or prejudiced by a decision, and hence is without status as an appellant.

In re Michigan-Ohio Bldg. Corp. (7 CA) 117 F. (2) 191
In re Keystone Realty Holding Co., 117 F. (2) 1003, 1005.
In the Matter of 620 Church Street Bldg. Corp. et al., 299 U.S. 24

More particularly, as to fee allowances, one not a beneficiary has no standing to appeal.

Merchants Loan & Tr. Co. v. Patterson, 308 Ill. 519 139 N. E. 912, 920.

c.

In any event, appellant's failure to appear at the hearing or to address anything to the fee petitions, either before or after the bar-date, ordered by the Court, precludes it from now attacking the allowances below.

By Rule 12 of the Rules of Civil Procedure, anything not controverted by answer, is admitted. By Rule 46, while exceptions are not necessary below, a party cannot complain on appeal unless he has made known below the action he desired.

Accordingly, since appellant wholly ignored below the matters of which it here seeks to complain, it can bring nothing here for review.

d.

This appeal should be dismissed as sham. To appellant's own knowledge, it is a "no value" party and it has been directly told by this Court in 226 F. (2) 113 that being such a party it has no appealable status.

Further, appellant's "points on appeal" in this record demonstrate this is a sham appeal. Its point 1 (a) is an attempted renewal of its defeated attack on the Amended Reorganization Plan in the face of the decisions of this tribunal in both 198 F. (2) 392, and 226 F. (2) 113.

Point 1 (b) claims an appeal "for reasons of public policy." The appeal statute limits appeals to those by an "aggrieved party" and lends no countenance to "public policy" ones.

Point 2 (a) is that subsequent developments show that the whole proceeding is a device to oust the state courts. Again, 226 F. (2) 113 gives the answer.

> "It is this plan which is now under attack, for reasons which we find difficult to comprehend. The strategy of the appellant, however, appears to rest upon the hope that a reversal will result in a dismissal of the proceeding with the rights of the parties relegated to the State courts, where litigation can be renewed and perhaps continued for another ten years."

Point 2 (b) is only a re-statement of 2 (a) above. Point 2 (c) is that the allowances are excessive. They are not, but if they were, a non-appearing and non-objecting party,

were he other than a "no value" one, cannot raise that question.

Point 2 (b) is that the fee petitioners were disqualified. Again, they were not, but if they were, a non-appearing and non-participating and non-objecting party cannot raise that question. Each of the fee petitions, as a matter of record, attaches the required statutory affidavit.

WHEREFORE, this appellee moves that this appeal be dismissed and that the ruling on this motion be neither deferred until the printing of the record nor until final hearing.

ALBERT H. GAVIT
As attorney for McM. Coffing, as
Trustee of V-I-D, INC.
504 Broadway, Gary, Indiana

STATE OF INDIANA,
County of Lake, ss:

ALBERT H. GAVIT being first duly sworn, on oath, says that he is attorney for appellee, McM. Coffing, as Trustee, of V-I-D, INC. He makes this affidavit for him and is authorized to do so. The statements contained in the foregoing motion are true.

ALBERT H. GAVIT

Subscribed and sworn to before me this 8 day of March, 1957.

ERMIL GIBBS
NOTARY PUBLIC

My commission expires December 9, 1959

Appendix—Appellant's Opposition to Motions to Dismiss

(Caption omitted—filed April 1, 1957)

APPELLANT'S BRIEF OPPOSING MOTIONS TO DISMISS

The motions and briefs for dismissal raise substantially similar questions and will be treated together.

Basis of this Court's Jurisdiction

The appellees do not deny that notice of appeal was timely filed below, nor that the transcript was timely filed and the appeal timely docketed in this Court.

Neither is it denied that an appeal from fee allowances below are now governed by the same practice as civil appeals.

11 U.S.C.A. 47 and 48
This Court's Rule 10(a)

The suggestion in one of the motions that leave should have been obtained from this Court to appeal, is not supported by the brief and is frivolous, in view of the fact that the order appealed from makes fee allowances of $35,500.00 (Tr. 140), in addition to previous interim allowances in 1950 of $6,000.00, plus the fact that this appellant, the admitted holder of an allowed Class 2 claim of about $80,000.00 against the debtor's property, in its statement of points on this appeal raises *questions concerning the basic legality of the corporate reorganization proceeding below* (not attacking the original jurisdiction based upon approval of the petition for reorganization but based upon subsequent events in the record showing that the proceeding *became* and was *used* as a *perversion* of the Chapter 10 reorganization machinery), and the fact that the statement of points *attacks the legality of the major part of the allowed fees as being contrary to the statutes*. Questions

of this character have always been recognized as outside of the $500.00 clause regardless of the amount or value involved in the appeal to the individual appellant.

In addition, this appellant falls squarely within the term "any creditor" who is given the right to be heard by the following section, and "right to be heard" has repeatedly been construed as the right to be heard on appeal as well as in the District Court:

> "The debtor, the indenture trustees, and *any creditor* or stockholder of the debtor *shall* have the *right* to be *heard* on *all* matters arising in a proceeding under this chapter."
>
> 11 U.S.C.A. 606
>
> "Appeals may be taken in matters of *law* or *fact* from orders making or refusing to make allowances of compensation or reimbursement, and may, in the *manner* and within the *time* provided for appeals by this title, be taken to and allowed by the Circuit Court of Appeals *independently of other appeals* in the proceeding, and shall be similarly heard upon the original papers."
>
> 11 U.S.C.A. 650

The "No Interest" Argument

The two sections above quoted do not make the right of appeal contingent upon the appellant having a direct pecuniary interest. In fact, no appeal opposing a fee allowance would involve a direct pecuniary interest of the appellant except indirectly as the allowance below reduced or *prejudiced* the appellant's rights.

Appellant contends, and believes it can show in its Appellant's Brief on the merits (where these questions properly belong) that:

1. This corporate reorganization, which as admitted in the motion to dismiss, has existed eighteen years from 1939 to 1957, involving only one rather small building in Gary, and which has served not to reorganize the debtor but to *reverse the lien rights* of the Class 1 and Class 2 mortgages, so that this appellant whose $80,000.00 lien would be a first lien if the state court foreclosure had not been superseded by this "reorganization" in 1939, has been relegated in this proceeding to a second lien of alleged "no value". This perversion of the Chapter 10 machinery which will become more apparent in Appellant's Brief on the merits, is still within this Court of Appeals power to remedy as shown in 3 *infra*.

2. The allowance of fees in the order appealed from ($35,500.00), in addition to $6,000.00 interim allowances in 1950, making total fees of $41,500.00, (Tr. 145), which is between 40 and 50% of the debtor's total assets consisting of a $50,000.00 building and about $44,000.00 of accumulated rentals in the trustee's hands, is enormous on the face of the record. But in addition, other matters appear on the face of the record casting grave doubt upon the propriety of any allowance to certain of the major fee claimants:

(a) Intervenor Kramer filed written objections to the petition for fee allowance of trustee's counsel, Draper & Draper (Tr. 104) and to the fee petition of debtor's counsel, Kenneth Call (Tr. 107), contending that both Draper & Draper and Mr. Call had been counsel for the foreclosing Class 1 bondholders in the state court and, that the litigation in this proceeding "was the outgrowth of the switching of the foreclosure in Lake Superior Court to this Court", wherein attorney Call became and remained the debtor's counsel and Draper & Draper became and remained

the trustee's counsel from 1939 to 1955. During the fee hearing, however, Kramer asked leave to withdraw these objections, his counsel saying "I see with those written objections it is going to make it difficult for the court" (Reporter's Transcript of hearing, p. 63 bottom). The facts stated in those withdrawn objections (which are shown to be true by other parts of the record) probably disqualify and render improper the entire Draper fee allowance of $23,000.00 in the order appealed from, plus $4,000.00 interim allowance in 1950, as well as the $1,000.00 allowance to attorney Call in the last order plus $2,000.00 in the 1950 order, by virtue of:

11 U.S.C.A. 557 and 558

(b) In addition, it was repeatedly indicated and often expressly stated by Kramer's counsel, Mr. Lyddick, at the fee hearing that Kramer as a holder of about $103,000.00 of the $135,000.00 of Class 1 bonds had agreed with several of the fee claimants (apparently during the six months interval between the filing of his above objections and the hearing), that their fee claims should be reduced to and allowed in specific amounts, subject to the approval of the court, with the idea that the court need only hear "formal" proof of the fee petition, in the light of this understanding. (See Reporter's Transcript, pp. 3, 4, 5, 6, 7, 8, 9, 10):

> "MR. DRAPER: If the Court please, it was my thought—well, first, what Mr. Lyddick has said is true. The claimants whom I represent have agreed that the Court might allow the sum of $19,000, in addition to any allowances heretofore made and paid for services rendered, plus expense

incurred, which I think amounted to around $400, or something of that kind. Nevertheless, it was my feeling that we should make a showing by a witness who was familiar with that kind of work.* * *"

Reporter's Transcript, pp. 13-14

"THE COURT: What is the basis of your reduction here, between the amount you originally claimed or asked for and the amount that you are now willing to reduce that claim to?"

"MR. CALL: To be honest about it, I feel that the ethics of the law profession are such that a lawyer should lean over as far backwards as possible in having no dispute or argument over fees. I had that in mind, and I so talked to Mr. Lyddick about it, that I felt that lawyers should not have any dispute over fees.* * *

"In other words, to go through with a contest, it would mean that you would have to have witnesses, which would impose again on the law profession, as to the reasonableness of the fees; it would necessitate a long hearing, be costly, and would result no doubt in an appeal, to the Circuit Court of Appeals in this particular case; so rather than to have any dispute or any questions raised I made that type of settlement."

Reporter's Transcript, pp. 33-34

"MR. LYDDICK: * * * and Saturday night Mr. Shadur called me and said it would be impossible for any one of their firm to come out today. He said, 'Besides, it was my understanding that we would accept'—I have a letter here dated April

26th—'that we would accept $300 in satisfaction of our petition, plus some expenses of $36, if we didn't have to come out again.' "

Reporter's Transcript, pp. 38-39

The District Court, however, on several occasions indicated that it would not be bound by agreements of counsel as to fees and would require evidence. (Reporter's Transcript, 51, and other passages to be recited in Appellant's Brief on the merits).

Without attempting to go into the merits here, and without implying anything beyond what appears on the face of the record and the statutes, appellant believes that *a further ground of probable illegality of fee allowances* of major claimants indicated in the above quoted parts of the record,—it certainly is one which should not be ignored or thrown out of the Court of Appeals without consideration, on the motion of the claimants themselves,—is the following section making it illegal for any "creditor" (such as Kramer) "or attorney for" a debtor, creditor or trustee, to enter "into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, *for the purpose* of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith from the assets of the estate;" (our emphasis).

18 U.S.C.A. 155

3. As admitted in the motion of trustee McM. Coffing, although an Amended Plan has been approved, same has not been and cannot be "consummated" until after final adjudication and payment of fees, plus a final trustee's

report, final decree closing the proceeding, etc.,—none of which has yet occurred. Prior orders, and appeals therefrom, such as orders classifying creditors, orders approving the plan, etc. are interlocutory in nature, and—

> "Bankruptcy courts are 'courts of equity without terms,' and *the entire process* of reorganization is *open to re-examination* until the *closing* of the proceedings. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 63 S. Ct. 123, 138, 87 L.Ed. 146;"
>
> *National City Bank* v. *O'Connell*, (2 Cir. 1946) 155 F. 2d 329, 332, point 5

Accordingly, this Court has complete power to make any necessary review of the entire proceeding below (and we believe that all parts of the record below from the beginning which may be necessary for review of these basic questions will be found in the record of this appeal). This power is not cut off by the fact that this Court disclaimed jurisdiction by dismissing the last appeal of this appellant from the interlocutory order approving the Amended Plan (not involving any question of fees), because an erroneous disclaimer of jurisdiction can be cured by subsequent assumption of it, particularly in a reorganization proceeding. *Leiman* v. *Guttman* (1949) 336 U. S. 1, 69 S. Ct. 371.

Neither is there any merit in the point that because appellant did not participate in the fee hearings below, its right to appeal from the order allowing fees is cut off. On an analogous question of approval of a plan, the right to be heard under *11 U.S.C.A. 606*, above quoted at page 2, was held to include the right of appeal, and also held not to be cut off by failure to use an earlier available right of hearing. *Horowitz* v. *Kaplan* (1 Cir.), 152, 173 F. 2d 64, 66,

points 1 and 6 (typographical error—should read 193 F. 2d 64, 66). In addition, on September 10, 1957, when this fee hearing came on (Reporter's Tr. p. 1) appellant's sole counsel was necessarily in a prolonged trial in the Circuit Court at Warren County, Indiana. Moreover, these appellees who have in the past repeatedly and presently urge that this appellant was not and is not entitled to be heard below or on appeal because its Class 2 claim allegedly "has no value", are in no position to argue that the appellant should have participated in the fee hearings.

At least, as regards fee allowances, the attorneys and officers do not become entitled to fees because some other party fails to file objections (none are required) or contest than at the hearing. The burden is on the petitioners throughout, and the duty devolves upon the petitioning attorneys as officers of the court, and upon the court itself, not to seek or allow fees contrary to the requirements of *11 U.S.C.A. 557 and 558*, and particularly not to seek or allow fees contrary to *78 U.S.C.A. 155, supra.*

The major part of the motions and briefs to dismiss are actually a premature attempt to argue the merits of the appeal, and hence, are not discussed as fully here as we desire and expect to do in Appellant's Brief on the merits.

Therefore it is respectfully submitted that the motions to dismiss should be denied, or at least decision thereon suspended until final hearing on the merits.

JAY E. DARLINGTON,
Attorney for Appellant.

(Affidavit of service of above Brief on April 1, 1957, omitted)

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11983

SEPTEMBER TERM 1956, APRIL SESSION, 1957

In the Matter of V-I-D, Inc., *Debtor.*
KELLEY, GLOVER and VALE, INC., Trustee, *Appellant,*

vs.

McM. COFFING, Trustee, et al., *Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

April 22, 1957

Before. MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

Per Curiam. In previous appeals, Nos. 11194 and 11265, 226 F. 2d 113, the present appellant was before this court. In those cases appellant appealed from orders entered approving a Chapter X Reorganization Plan. In our decision, we recognized that the net result of this prolonged litigation was the determination that appellant, a mortgage holder, was relegated to the status of a Class 2 creditor, and that the bond holders were Class 1 creditors. As the assets were insufficient to cover the claims of the Class 1 creditors, appellant's claim was of no value. Consequently, we concluded that the appellant did not have an appealable interest and allowed a motion to dismiss the appeal.

The present appeal seems to be directed to the basic legality of the reorganization proceedings as well as to fee allowances. However, as pointed out by the appellee, necessarily, as a prerequisite to this appeal, appellant must be an aggrieved party. Therefore, appellant stands in precisely the same position it occupied in the previous appeal, and the motion to dismiss must be and is granted. The petition for leave to file additional parts of the designated record is denied.

A true Copy:

Teste:

(Seal) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, April 22, 1957

Before

Hon. J. Earl Major, *Circuit Judge*
Hon. Philip J. Finnegan, *Circuit Judge*
Hon. Walter C. Lindley, *Circuit Judge*

In the Matter of V-I-D, Inc., *Debtor.*

Kelley, Glover and Vale, Inc., *Appellant,*

vs.

No. 11983

McM. Coffing, Trustee, et al., *Appellees.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This matter comes before the Court on the motions of appellees to dismiss appeal, and briefs in support, and appellant's brief in opposition thereto, and Appellant's petition for leave to file additional parts of the designated record.

On consideration whereof, it is ordered by the Court that the motions to dismiss be granted, and this appeal be DISMISSED, with costs.

It is further ordered by the Court that the petition for leave to file additional parts of the designated record be DENIED.

Appendix—Certificate of Clerk of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of the Motion to Dismiss Appeal, filed March 1, 1957,

Motion of Appellee, McM. Coffing, as Trustee of V-I-D, Inc., to Dismiss Appeal, filed March 9, 1957,

Appellant's Brief Opposing Motions to Dismiss, filed April 1, 1957,

Per Curiam Opinion, filed April 22, 1957 and Judgment, entered April 23, 1957, in

Cause No. 11983

In the Matter of V-I-D, Inc., *Debtor.*

KELLEY, GLOVER and VALE, INC., *Appellant;*

vs.

McM. COFFING, Trustee, et al., *Appellees,*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this nineteenth day of July, A.D. 1957

(SEAL)

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.